

ACLU Q&A: Amendment 2

March 1993

How could Amendment 2 be unconstitutional if a majority of Coloradans voted for it?

Because America is a **constitutional democracy**. That means that not even a majority of voters can eliminate the fundamental individual rights guaranteed to every citizen under the U.S. Constitution. For example, a majority of Colorado voters could approve a ballot initiative that establishes slavery in our state. However, the initiative would be declared unconstitutional because it violates a fundamental right guaranteed in the U.S. Constitution.

What is a fundamental right?

The U.S. Supreme Court determines fundamental rights through the decisions it makes on the cases it hears. For example, the Court has labeled the right of citizens to seek help through the court system as a fundamental right. In America, fundamental rights take precedence over all others.

How could Amendment 2 get on the ballot in the first place if it's unconstitutional?

The laws in Colorado make it relatively easy to put an issue on the ballot. For the most part, sponsors just have to get enough voters to sign their petitions.

Could we have stopped the amendment from going on the ballot in the first place?

Probably not.

Why is the ACLU involved?

The ACLU is dedicated to protecting the civil liberties of all citizens. We believe Amendment 2 is unconstitutional because it denies fundamental rights to a specific group of Americans simply because of their sexual orientation. Among the claims in the complaint we filed in District Court are that the

amendment violates the First and Fourteenth Amendments to the U.S. Constitution and Article II of the Colorado Constitution, which is the State's bill of rights.

What constitutional rights are violated by Amendment 2?

The complaint asks the Court to agree that Amendment 2 violates the right of **equal protection** under the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and the Due Process Clause of the Colorado Constitution, **freedom of association** and **freedom of expression** as guaranteed under the First Amendment to the U.S. Constitution and Article II of the Colorado Constitution, and the **establishment clause** and the **petition clause** of the First Amendment to the U.S. Constitution.

According to the complaint, how does Amendment 2 deprive gay men, lesbians and bisexuals of their Fourteenth Amendment and Due Process rights of equal protection?

The amendment forbids Colorado courts to enforce any local, state or federal laws, statutes or provisions that recognize or protect gay men, lesbians or bisexuals, which is a denial of equal protection. We also claim that it encourages and establishes a public and private right to discriminate against a specific group of people.

According to the complaint, how does Amendment 2 deny gay men, lesbians and bisexuals their First Amendment and State Constitution rights of freedom of association and expression?

The amendment discourages people from discussing their views about sexual orientation or advocating for equal rights for gay men, lesbians and bisexuals. It forces people to accept a

single, state-approved belief about sexual orientation and chills free speech about gay, lesbian or bisexual orientation.

According to the complaint, how does Amendment 2 violate the establishment clause of the First Amendment?

The amendment represents a particular religious view about gay, lesbian and bisexual orientation, advances that particular religious belief, and creates legislation with no secular purpose.

According to the complaint, how does Amendment 2 violate the right to petition as guaranteed under the First Amendment?

Gay men, lesbians and bisexuals are denied their fundamental right to petition their government for a redress of grievances.

What is protected status?

If a group can prove that it has been subjected to historical discrimination, the court or the government can grant that group "protected status." That status makes it illegal to discriminate against the group in the future. For example, deaf children cannot be denied public school education because of their disability. The civil rights laws of 1964 protect citizens from discrimination because of their gender, religion or race. Other groups, including the disabled, have been added to that list since then.

What are minority status and quota preferences?

Sometimes compensatory laws and regulations are enacted to correct past discrimination against specific groups. Gay men, lesbians and bisexuals have never sought such a remedy in Colorado.

(continued inside)

What's a claim of discrimination?

Under the law, discrimination is defined as unjust and unequal treatment based on someone else's personal bias or prejudice. In America, citizens can make a claim of discrimination if they believe they have been subjected to unjust or unequal treatment by individuals or governments that has resulted in the violation of their civil or constitutional rights.

Are gay men, lesbians and bisexuals discriminated against because of their sexual orientation?

Yes.

What are "special rights"?

"Special rights" is a campaign slogan used by Colorado for Family Values, the authors of Amendment 2. The phrase does not appear in the amendment and has no specific legal meaning.

Do gay men, lesbians and bisexuals want "special rights"?

No. Gay men, lesbians and bisexuals have not asked for special rights. They want to be treated the same and have the same access to the political process as any other American citizen.

Don't gay men, lesbians and bisexuals already have the same rights as everyone else?

Not under Amendment 2. For example, the amendment actually denies gay men, lesbians and bisexuals the fundamental right to appeal to the court system or seek assistance from the government if they think they were discriminated against because of their sexual orientation. Amendment 2 allows heterosexuals to make claims of discrimination based on sexual orientation, but denies that same right to gay men, lesbians and bisexuals.

Who is Colorado for Family Values?

Colorado for Family Values put Amendment 2 on the ballot. Based in Colorado Springs, Colorado for Family Values is part of a national network of organizations supported by far-right religious and political organizations, including the Christian Coalition and the National Legal Foundation, both affiliated with Pat Robertson, and Lou Sheldon's Traditional Values Coalition.

Why did Colorado for Family Values put Amendment 2 on the ballot?

They believe they are doing the right thing. They consider homosexuality an "abomination" and state that heterosexuality is the only "correct" sexual orientation. They believe that homosexuality is "behavior-based." They believe human beings "choose" their sexual orientation and that all of us could be heterosexual if we really wanted to be.

Does the amendment also deny fundamental rights to gay men, lesbians and bisexuals even if they are celibate or maintain opposite sex relationships?

Yes.

Who are the plaintiffs in the lawsuit?

Nine Colorado citizens—including tennis player Martina Navratilova, an ordained minister and a straight man who is living with AIDS—the cities of Boulder, Aspen and Denver and the Boulder Valley School District.

Why are Boulder, Denver and Aspen plaintiffs in the lawsuit?

They passed ordinances that eliminate discrimination in housing, employment and public accommodations because of sexual orientation, age, marital status, gender, family responsibility, disability and several other characteristics. Amendment 2 wipes all three of the ordinances off the books and prevents the passage of similar rulings anywhere in Colorado in the future. These plaintiffs claim that their home rule rights have been violated.

What is home rule?

Home rule is the power given to certain cities by the Colorado State Constitution to control their own government.

Who are the attorneys in this case?

Jean E. Dubofsky, the lead attorney for the lawsuit, is a former Colorado Supreme Court Justice and a past member of the ACLU of Colorado Board of Directors. **David H. Miller** is the Legal Director of the ACLU of Colorado. **Gregory A. Eurich**, the ACLU cooperating attorney, practices law at Holland & Hart. **Jeanne Winer** is a sole practitioner in Boulder, Colorado, with an emphasis on criminal defense. These four attorneys are volunteering their services *pro bono*, free of charge. The city attorneys of Boulder, Denver and Aspen are also co-counselors.

What organizations are involved?

The ACLU of Colorado, the national Lesbian and Gay Rights Project of the ACLU, the Colorado Legal Initiatives Project (CLIP), and the Lambda Legal Defense and Education Fund provide support.

How much is the lawsuit going to cost and who's paying for it?

If the lawsuit goes all the way to the U.S. Supreme Court, it could cost between \$30,000 and \$100,000 or more. Each organization covers its own costs, including staff salaries, photocopying, printing and other overhead expenses. In addition, CLIP has pledged to pay for out-of-office costs, such as bringing in expert witnesses.

What else is the ACLU doing to fight this amendment?

We send trained speakers to schools and organizations, put on conferences, hold special events, develop and distribute factsheets and other materials, keep the media informed, give interviews, answer requests for information and work cooperatively with many other organizations and citizens.

(continued . . .)

What is Amendment 2?

*On Election Day 1992,
53.4 percent of the voters passed an initiative
that appeared on the ballot as Amendment 2,
which amends the Constitution of the State of Colorado
by adding a new section to Article II,
Colorado's bill of rights:*

**NO PROTECTED STATUS BASED ON HOMOSEXUAL,
LESBIAN OR BISEXUAL ORIENTATION.**

*Neither the State of Colorado, through any of its branches or
departments, nor any of its agencies, political subdivisions,
municipalities or school districts, shall enact, adopt or enforce
any statute, regulation, ordinance or policy whereby
homosexual, lesbian or bisexual orientation, conduct,
practices or relationships shall constitute or otherwise be the
basis of, or entitle any person or class of persons to have or
claim any minority status, quota preferences, protected status
or claim of discrimination. This Section of the Constitution
shall be in all respects self-executing.*

What's a claim of discrimination?

Under the law, discrimination is defined as unjust and unequal treatment based on someone else's personal bias or prejudice. In America, citizens can make a claim of discrimination if they believe they have been subjected to unjust or unequal treatment by individuals or governments that has resulted in the violation of their civil or constitutional rights.

Are gay men, lesbians and bisexuals discriminated against because of their sexual orientation?

Yes.

What are "special rights"?

"Special rights" is a campaign slogan used by Colorado for Family Values, the authors of Amendment 2. The phrase does not appear in the amendment and has no specific legal meaning.

Do gay men, lesbians and bisexuals want "special rights"?

No. Gay men, lesbians and bisexuals have not asked for special rights. They want to be treated the same and have the same access to the political process as any other American citizen.

Don't gay men, lesbians and bisexuals already have the same rights as everyone else?

Not under Amendment 2. For example, the amendment actually denies gay men, lesbians and bisexuals the fundamental right to appeal to the court system or seek assistance from the government if they think they were discriminated against because of their sexual orientation. Amendment 2 allows heterosexuals to make claims of discrimination based on sexual orientation, but denies that same right to gay men, lesbians and bisexuals.

Who is Colorado for Family Values?

Colorado for Family Values put Amendment 2 on the ballot. Based in Colorado Springs, Colorado for Family Values is part of a national network of organizations supported by far-right religious and political organizations, including the Christian Coalition and the National Legal Foundation, both affiliated with Pat Robertson, and Lou Sheldon's Traditional Values Coalition.

Why did Colorado for Family Values put Amendment 2 on the ballot?

They believe they are doing the right thing. They consider homosexuality an "abomination" and state that heterosexuality is the only "correct" sexual orientation. They believe that homosexuality is "behavior-based." They believe human beings "choose" their sexual orientation and that all of us could be heterosexual if we really wanted to be.

Does the amendment also deny fundamental rights to gay men, lesbians and bisexuals even if they are celibate or maintain opposite sex relationships?

Yes.

Who are the plaintiffs in the lawsuit?

Nine Colorado citizens—including tennis player Martina Navratilova, an ordained minister and a straight man who is living with AIDS—the cities of Boulder, Aspen and Denver and the Boulder Valley School District.

Why are Boulder, Denver and Aspen plaintiffs in the lawsuit?

They passed ordinances that eliminate discrimination in housing, employment and public accommodations because of sexual orientation, age, marital status, gender, family responsibility, disability and several other characteristics. Amendment 2 wipes all three of the ordinances off the books and prevents the passage of similar rulings anywhere in Colorado in the future. These plaintiffs claim that their home rule rights have been violated.

What is home rule?

Home rule is the power given to certain cities by the Colorado State Constitution to control their own government.

Who are the attorneys in this case?

Jean E. Dubofsky, the lead attorney for the lawsuit, is a former Colorado Supreme Court Justice and a past member of the ACLU of Colorado Board of Directors. David H. Miller is the Legal Director of the ACLU of Colorado. Gregory A. Eurich, the ACLU cooperating attorney, practices law at Holland & Hart. Jeanne Winer is a sole practitioner in Boulder, Colorado, with an emphasis on criminal defense. These four attorneys are volunteering their services *pro bono*, free of charge. The city attorneys of Boulder, Denver and Aspen are also co-counsels.

What organizations are involved?

The ACLU of Colorado, the national Lesbian and Gay Rights Project of the ACLU, the Colorado Legal Initiatives Project (CLIP), and the Lambda Legal Defense and Education Fund provide support.

How much is the lawsuit going to cost and who's paying for it?

If the lawsuit goes all the way to the U.S. Supreme Court, it could cost between \$30,000 and \$100,000 or more. Each organization covers its own costs, including staff salaries, photocopying, printing and other overhead expenses. In addition, CLIP has pledged to pay for out-of-office costs, such as bringing in expert witnesses.

What else is the ACLU doing to fight this amendment?

We send trained speakers to schools and organizations, put on conferences, hold special events, develop and distribute factsheets and other materials, keep the media informed, give interviews, answer requests for information and work cooperatively with many other organizations and citizens.

(continued...)

FIND OUT HOW TO SPEAK OUT ON AMENDMENT 2

FREE ACLU Speakers Bureau Training

Wednesday evening
March 24, 1993
6 p.m. to 9 p.m.
First Unitarian-Universalist Church
1400 Lafayette
Denver, Colorado

RSVP by Monday, March 22, 1993

Light supper available from 5:30 to 6:00 for \$5 each **prepaid**

FREE information kits

Name _____
Address _____
City _____ State _____ Zip _____
Phones (day) _____ (eve) _____
____ I'll be there.
____ I'm bringing _____ people with me.
____ Check enclosed for _____ supper(s) at \$5 each. TOTAL \$ _____
____ I'm interested, but can't make it on the 24th. Keep me informed.
Please return this reservation or a photocopy – *with your check if you want supper* – to:
ACLU, 815 East 22nd Avenue, Denver, CO 80205

How is the ACLU paying for this?
Out of our general fund, which comes from membership dues, contributions, fundraising events and court awards.

Does the ACLU of Colorado need money to help fight this amendment?

Are you kidding? Of course.

What else can I do in addition to sending money?

Train to be a speaker, volunteer at the office, help us raise money, assist with educational events, write letters, speak up.

How can we overturn this amendment?

In one of two ways. It could be repealed or superseded in a general election. Or the court may find it to be unconstitutional.

Why are Governor Romer and Attorney General Gale Norton the defendants in the lawsuit?

Because they are the official representatives of the State. Regardless of their personal opinions, they are required to be included in the case.

What states have been targeted for the next round of anti-gay legislation?

Currently, the far-right is working to pass laws similar to Amendment 2 in 12 states: California, Florida, Georgia, Iowa, Maine, Michigan, Minnesota, Missouri, Ohio, Oregon and Washington.

What's happened to the amendment so far?

The voters passed Amendment 2 on Election Day, November 3, 1992. The suit against it was filed in State District Court in Denver on November 12. The amendment was supposed to take effect on January 15, 1993. However, we filed a motion for a preliminary injunction to keep the amendment from becoming effective until the court decides on its legality. After three-and-a-half days of hearings, Denver District Court Judge Jeffrey Bayless granted the preliminary injunction on January 15.

Why did Judge Bayless grant the injunction?

In his decision, Judge Bayless said that the plaintiffs have a good chance of proving that Amendment 2 violates the fundamental right of a particular group of Americans to participate in the political process. Gay men, lesbians and bisexuals would be prohibited from going to the courts, the legislature or any other governmental body to fight discrimination against them because of their sexual orientation.

What's next? Will the lawsuit go to the U.S. Supreme Court?

We don't know. We expect Judge Bayless to have the final trial on the complaint this fall. The case will surely go to the Colorado Supreme Court, since whichever side loses in District Court will appeal. Depending on the

Colorado Supreme Court's decision, the case could be taken to the U.S. Supreme Court.

What's the position of the ACLU of Colorado on the boycott?

Since we are currently involved in the lawsuit, our Board of Directors voted to take a neutral position on the boycott and continue to do whatever we can to repeal the amendment. However, the national office of the ACLU and some of the other ACLU affiliates have voted to support it.

How can I get more information about the far-right in Colorado Springs?

Citizens Project monitors the far-right in El Paso County. Reach them at: P.O. Box 2085
Colorado Springs, CO 80901-2085
719-685-9899
Fax: 719-634-5995

More than 850 people showed up for the first organizational meeting at the end of January. Ask about the newsletter.

You can also get the scoop directly from Colorado for Family Values at: 228 N. Cascade Ave. #102
Colorado Springs, CO 80903
719-577-4916 or 719-548-0458
Fax: 719-471-1358

(continued . . .)

What counties voted against Amendment 2?

Boulder, Clear Creek, Costilla, Denver, Eagle, Garfield, Gilpin, Gunnison, Hinsdale, La Plata, Pitkin, Routt, San Juan, San Miguel and Summit.

How can I get more information about the lawsuit against Amendment 2?

We have a packet of information that includes the complaint, news clips, media releases, briefs and the decisions. Send us \$7 to cover copying and postage, and we'll send it to you: ACLU, 815 E. 22nd Ave., Denver, CO 80205. ■

OTHER ACLU NEWS

The Annual Meeting

Two hundred people showed up at Temple Emanuel on December 1, 1992, for a tasty spaghetti dinner catered by Footers with dessert from Child's. There was plenty of good conversation, a brief business meeting, and a lively post-election discussion with a panel of civil liberties experts.

Chairperson **Don Bounds** and the members of his Education Committee were the hosts for the evening. Many thanks to all the wonderful volunteers and the great staff at Temple Emanuel.

Outgoing Board president **Dan Recht** admitted he'll be glad to get out of the budget business and back on the legal panel. Thanks, Dan, for your outstanding leadership during the last two years.

Our panel was moderated by incoming Board president **Gwen Thomas**. Dean **Gene Nichol** from D.U. Law School; Governor Romer's Counsel (at the time) **Cole Finegan**; State Representative **Dorothy Rupert**; Rabbi **Steven Foster** from the Equal Protection Coalition; **Dan Morris**, the president of the Colorado Education Association; **Timothy Leifield** of the Boulder County AIDS Project; and our own **David Miller**

discussed the election results and their possible impact on civil liberties.

Cole, acknowledging that life often takes strange turns, said he remembered thinking last year how uncomfortable the ACLU had probably been having to defend the KKK—and here he was a year later having to defend Amendment 2. ■

Ross v. Department of Health and Hospitals and City and County of Denver

On December 3, 1992, a trial court judge awarded a lesbian employee sick leave benefits to care for her gay life partner. This was a first for Colorado—and perhaps the nation.

In his decision, Judge Richard T. Spriggs reinstated an earlier ruling that had awarded Mary K. Ross three days sick leave to care for her partner, who had suffered severe head injuries in an accident. At the time, Ross worked for the city.

The Denver Career Service rules allow employees to use sick leave to provide care for members of their immediate families. However, Ross' supervisor had denied her request because the definition of "immediate family" excludes gay life partners.

Judge Spriggs ruled that the definition was unreasonably narrow. He also ruled that Denver's ordinance prohibiting discrimination based on sexual orientation barred enforcement of a definition of "immediate family" that excluded gay life partners from family sick leave benefits. The City is appealing the decision.

Ross is represented by ACLU cooperating attorney **Lino Lipinsky de Orlov**, assisted by ACLU Legal Director **David Miller** and attorneys from the national ACLU Lesbian and Gay Rights Project. ■

ACLU of Colorado Board of Directors

Ellen Anderman	David Lane
Karen Ashby	Steve Meyrich
Susan Barber	George Morgan
Don Bounds	Daniel Recht
Jorge Castillo	William Reynard
Joel Ehrlich	Glenda Roberts
Steven Foster	Ron Rossi
James Frank	Bruce Sattler
Sandra Goldman	Buie Seawell
Regis Groff	Larry Soll
David Kaplan	Gwen Thomas
Darold Killmer	

ACLU of Colorado Staff

Executive Director, *James H. Joy*

Legal Director, *David H. Miller*

Associate Director, *Martha Sattler*

Public Information Director,

Nancy Solomon

Paralegal, *Leslie Pagett*

Office Manager, *Patsy Brown*

Administrative Assistant, *Lesley Brooks*

ACLU Q&A is an occasional publication of the American Civil Liberties Union of Colorado to keep our members and friends up-to-date about important civil liberties issues.

Publisher: *Education Committee*

Editor: *Nancy Solomon*

Graphic Design: *Grindstone Graphics*

Contributors: *David Miller,*

Nina Shilodon, Peter Gross,

ACLU staff and volunteers, the women in

the dressing room for

"A Quiet Little Wedding" at

the Denver Center Theater Company,

and Gayle Mertz.



ACLU
OF COLORADO

ACLU of Colorado

815 E. 22nd Ave.

Denver, CO 80205

Phone: (303) 861-2258

Fax: (303) 861-2269

and then some . . .

Everything you need to know
to win arguments about AMENDMENT 2

ENCLOSED:



AMERICAN CIVIL LIBERTIES UNION OF COLORADO
815 EAST 22ND AVENUE
DENVER, COLORADO 80205
ADDRESS CORRECTION REQUESTED

Non Profit
U.S. Postage
PAID
Denver, CO
Permit No. 236

What is Amendment 2?

*On Election Day 1992,
53.4 percent of the voters passed an initiative
that appeared on the ballot as Amendment 2,
which amends the Constitution of the State of Colorado
by adding a new section to Article II,
Colorado's bill of rights:*

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION.

*Neither the State of Colorado, through any of its branches or departments, nor
any of its agencies, political subdivisions, municipalities or school districts,
shall enact, adopt or enforce any statute, regulation, ordinance or policy
whereby homosexual, lesbian or bisexual orientation, conduct, practices or
relationships shall constitute or otherwise be the basis of, or entitle any person
or class of persons to have or claim any minority status, quota preferences,
protected status or claim of discrimination. This Section of the Constitution
shall be in all respects self-executing.*